



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 28, 2022

IN THE MATTER OF:

Appeal Board No. 625112

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 625111 and 625112, the claimant appeals from the decisions of the Administrative Law Judge filed July 19, 2022, insofar as the decisions sustained the Commissioner of Labor's timeliness objection and continued in effect the determination, holding the claimant ineligible because he was not available for employment from January 9, 2020, through October 8, 2021, only; charging the claimant with an overpayment of \$4,888.00 in regular benefits recoverable pursuant to Labor Law § 597 (4); and charging the

claimant with an overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits of \$10,200.00 recoverable pursuant to § 2104 (f)(2) of the

Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

In Appeal Board Nos. 625113, and 625114, the claimant appeals from the decisions of the Administrative Law Judge filed July 19, 2022, insofar as the decisions sustained the Commissioner of Labor's timeliness objection and continued in effect the initial determinations, holding the claimant ineligible because he did not comply with reporting requirements from January 9, 2020, through October 8, 2021, only; charging the claimant with an overpayment of \$4,888.00 in regular benefits recoverable pursuant to Labor Law § 597 (4); and charging the claimant with an overpayment of Federal Pandemic

Unemployment Compensation (FPUC) of \$10,200.00 recoverable pursuant to § 2104

(f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020.

At the combined telephone conference hearings before the Administrative Law Judge, testimony was taken. There was an appearance by the claimant and on behalf of the Commissioner of Labor.

Our review of the record reveals that the case should be remanded to hold a further hearing on the issue of timeliness and initial determinations set forth above. Initially, based on the claimant's demonstrated difficulty in speaking and understanding English, the matter was remanded for a further hearing in Appeal Board Nos. 620995, 620996, 620997 and 620998 mailed May 18, 2022. However, although the hearing notice for the July 19, 2022 hearing included the claimant's current telephone number, the Administrative Law Judge telephoned the claimant at an old telephone number without success. In the interests of justice, the Board has determined to provide the claimant another opportunity to appear and testify in this matter and to cross-examine the Commissioner of Labor's witness as to his testimony.

The Administrative Law Judge will take further testimony and evidence as to the timeliness of the claimant's hearing requests. In furtherance of such testimony, the claimant will offer additional testimony about his handwritten notations on the Department of Labor Demand's for Payment, dated June 16, 2021, July 14, 2021, July 24, 2021, and September 30, 2021, as well as the July 24, 2021 letter to the Department of Labor, and asked to explain the reason for his handwritten statements on those documents, to whom he sent his responses, when he sent his responses, how he sent his responses (telephone, fax, mail), and whether he received a reply from the Department of Labor. Any additional documentary evidence in support of such testimony shall be produced at hearing for entrance into the record after an opportunity for objection.

As the claimant disputes the amount of the recoverable overpayment, the claimant is directed to produce bank records and/or bank statements from Key Bank which reflect the direct deposits made from the Department of Labor to the claimant's Key Bank account for the period from September 1, 2020, through December 31, 2020, as well as the 1099 W-2 from the Department of Labor as to unemployment insurance benefits received for the 2020 tax year. In conjunction with such testimony, the claimant will be confronted with the benefit ledger for the period at issue as well as the 2020 W-2 statement and will then testify further as to the amount of unemployment insurance benefits received for the period in question. These records will be entered into the record after an opportunity for objection. The failure to produce the bank records at

issue will result in a negative inference being taken against the claimant.

If sufficient testimony is found to then overcome the Commissioner of Labor's objection as to timeliness of the claimant's hearing request, the Administrative Law Judge will then proceed on the merits as follows:

The Commissioner of Labor is directed to appear and to produce Giacomo Amendolara, a witness with first-hand knowledge, who will be subject to cross-examination on the testimony offered at the July 19, 2022, hearing and any further testimony he may wish to offer at the remand hearing.

The Commissioner of Labor's witness is directed to produce all Department of Labor records of the claimant's certifications/back dated certifications for both regular and FPUC benefits made on September 9 to September 11, 2020, other than the "PUA Application by Source" previously marked as Hearing Exhibit 4 of July 2022, if any exist, as related to the recoverable overpayment of regular unemployment insurance benefits from January 2020 through August 2020 as well as Federal Pandemic Unemployment Insurance Benefits. The claimant will then testify whether he certified via the telephone or via the internet, whether he certified with assistance and if so, what type of assistance and from whom, the dates of his actual certifications, the weeks which these certifications covered, the questions asked, his responses and whether he was able to verify or modify his responses at any point.

Any documentary evidence in support of such testimony, including but not limited to the record of certification for unemployment insurance benefits and FPUC benefits, Department of Labor's records as to the responses offered by the claimant for each certification offered for the period at issue herein, the questions asked when certifying for each and every week at issue, the claimant's responses for each and every week at issue, all shall be entered into the record after an opportunity for objection.

The Judge shall then take any additional testimony and evidence as they find necessary to complete the record.

Now, based on the foregoing, it is

ORDERED, that the decisions of the Administrative Law Judge, insofar as they modified and sustained, and continued in effect the initial determinations,

be, and the same hereby are, rescinded; and it is further

ORDERED, that the cases shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues herein, upon due notice to all parties and their representatives; and it is further

ORDERED, that the claimant will contact the hearing section, in advance of the remand hearing date, to obtain a copy of the July 2022 hearing transcript, the July 2022 exhibits and all relevant hearing packets, in advance of the remand hearing date; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above actions to be taken, and so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render new decisions, on the issues, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MICHAEL T. GREASON, MEMBER